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IN THE

Supreme Court of the United States

October Term, 1960

No. [redacted] 130

APEX DISTRIBUTING CO. INC.,
ALBERT A. FINER and JOSEPH R. SNYDER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement

Petitioners, Apex Distributing Co. Inc., Albert A. Finer and Joseph R. Snyder, pray that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 5, 1961, as affirms their conviction under Count 11 of the indictment herein, of conspiracy to defraud the United States.

Opinion Below

The opinion of the Court of Appeals in this case has not as yet been reported. This opinion is set forth as an Appendix hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1961. On May 4, 1961, Mr. Justice John M. Harlan granted an order extending the time of petitioners to file their petition for writ of certiorari to and including June 4, 1961. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

The questions presented in this case, in its present posture, relate only to Count 11 of the indictment, and are as follows:

1. Whether the proof offered by the Government was sufficient to prove that petitioners conspired to defraud the United States as alleged in Count 11 of the indictment.

2. Whether Count 11, standing alone, constitutes part of an improper and impermissible fragmentation of one alleged conspiracy into two counts, i.e., Counts 1 and 11 of the indictment. Accordingly, whether the reversal of petitioners' conviction under Count 1 requires a reversal of their conviction under Count 11.

3. Whether the trial court committed prejudicial error in refusing to instruct the jury, as to Count 11, as requested by petitioners in accordance with Rule 30, Federal Rules of Criminal Procedure, in writing and, at the conclusion of the Court's charge, orally, when exceptions to the charge and additional requests to charge were noted in the record.

Statute and Rule Involved

Title 18, United States Code

§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the change or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

The Indictment

The indictment in this case contained 30 counts. Although only Count 11 is presently pending before the Court, it will be necessary to refer to the other counts in order to place Count 11 in proper perspective for consideration of this petition.

Count 1 alleged a conspiracy, from a date prior to January 1, 1954, to and including May 1, 1955, among Charles H. Gillilan, Albert A. Finer, Joseph R. Snyder, Apex Distributing Company, Inc., Wilshire Sales Associates, Inc. and Melrose Corporation, to violate Title 18, United States Code, §281, by the employment of defendant Gillilan, a Rear Admiral, United States Navy, Supply Corps, Retired, "to receive compensation for services rendered and to be rendered by him in relation to contracts and other matters in which the United States was a party, before the Department of the Navy . . . in whose service he held a retired status" (6a).[1] This conspiracy was alleged to be in violation of §371 of Title 18, United States Code, and 32 overt acts were pleaded as having been committed in furtherance of it (7a-11a).

Counts 2 through 10 inclusive, alleged substantive violations of Title 18, United States Code, §1001, and 2, by the filing of false statements on various dates by defendants Finer, Snyder and Apex, in matters within the jurisdiction of the Navy, relating to the payment of certain invoices for Quix products sold to the Navy. These false

[1] All numbers in parentheses, followed by the suffix "a", refer to pages in the Appellant's Appendix, and those without any suffix refer to pages in the original transcript of the trial, unless otherwise indicated.

statements allegedly related to the certificate on the invoices that it was "just and correct", which was false in that Quix was sold to Ships Stores Afloat under a contract not authorizing such sales (12a-21a).

Count 11 of the indictment alleged a conspiracy to defraud the United States in the following principal language:

> "2. That from a date unknown to the Grand Jurors, up to and including the 31st day of March, 1956, within the Eastern District of New York, the defendants, Albert A. Finer, Charles H. Gillilan, Joseph R. Snyder and Apex Distributing Company, Inc., did knowingly, wilfully and unlawfully conspire together and with each other, and with others to the Grand Jurors unknown, to defraud the United States
>
> a) of a sum of money,
>
> b) of and concerning its lawful right to have its designated and duly constituted agencies, offices, officers and employees comply with its Navy procurement regulations free from unlawful impairment by deceit, misrepresentations, false statements, and dishonesty; and
>
> c) of and concerning its lawful right to have its contracts performed in accordance with their terms without fraudulent solicitation and acceptance of orders thereunder" (21a-22a).

It was then alleged in paragraph 3 that in furtherance of said conspiracy the defendants:

> "(a) Sold and delivered 'Quix' to United States Navy vessels outside the Third Naval District and to the Philadelphia Naval Shipyard, within the Fourth Naval District, under contracts identified by Navy Purchasing Office Numbers N140s-49164B, N140s-

49952B and N140s-50713B, between the United States of America and Apex, knowing full well that sales and deliveries under the said contracts were restricted to the following Navy ordering activities within the Third Naval District:

'Any Naval Vessel At New York Or New Jersey Piers

Any Authorized Shore Activity In The Third Naval District

Metropolitan Area Of New York City, South Of The City of Yonkers, And Including Staten Island And Bayonne, New Jersey.

Submarine Base, New London, Connecticut'

(b) Made sales and deliveries of 'Quix' to Navy Ship's Stores Afloat, under a contract identified by Navy Purchasing Office Number N140s-22999B, between the United States of America and Quix, in some instances by false representations by sales representatives of Apex to Naval Officers to the effect that Ship's Stores Afloat could order under the said contract, knowing full well that by the terms of said contract, sales and deliveries were restricted to NPONY, any Naval Supply Center, Naval Supply Depot, Naval Shipyard, or Naval Station, and knowing full well that the said contract did not authorize, provide for or permit sales to Navy Ship's Stores Afloat.

(c) Knowing full well the Navy Ship's Stores Afloat were not authorized to procure beverage base, falsely represented to Navy Purchasing Offices and Ship's Stores Afloat that the said 'Quix' was a 'flavoring concentrate' which could be used as a flavoring

for ice cream and sherbets, knowing full well that the said 'Quix' could not be so used.

(d) Having procured contracts identified under Navy Purchasing Office Numbers N220s-95899A, N123s-2531A, N220s-93377A, N123s-99852A, N123s-1363A and N123s-3411A, for Quix Flavoring Concentrates at $1.95 per pint, delivered to the USS Badoeng Strait, CVE-116, the USS Philippine Sea, CVA-47, the USS Ajax, AR-6, the USS Washburne, AKA-108, the USS Eldorado, AG-611, the USS Wright, CVL-99, and the USS Seiverling, DE-441, pursuant to orders under said contracts, products in part labelled Apex Brand, California Brand, and Bellaire Brand, which said products were inferior in price and quality and not authorized for sale under the said contracts; and the defendants did bill and charge the United States of America for 'Quix' at the price of $1.95 a pint under the said contracts, and did therefore receive a sum of money to which they were not entitled, the exact amount of which is to the Grand Jurors unknown" (22a-24a).

Fifty-six overt acts were pleaded as having been committed in furtherance of this conspiracy (24a-32a). Since Admiral Gillilan was acquitted of Count 11, he will not be discussed further in connection with it.

It is to be observed that the contracts mentioned in paragraph 3(a) of this conspiracy count are the same contracts described in Counts 12 through 29 inclusive, which are charged as substantive violations of Title 18, United States Code, §1001, although this conspiracy is not charged as having been formed in part for the purpose of violating this statute. Similarly, as to paragraph 3(b) of this conspiracy count, the contract mentioned therein is the same

contract referred to in Counts 2 through 10 inclusive, which are also charged as substantive violations of §1001 (22a-23a, 12a-21a, 32a-54a).

Paragraph 3(c) of this count alleged false representations on the part of appellants that the Quix products "could be used as a flavoring for ice cream and sherbets, knowing full well that the said 'Quix' could not be so used" (23a). However, as to the substantive counts to which this allegation is addressed (Counts 12-29), all appellants were acquitted, Gillilan and Snyder by the action of the trial judge dismissing these counts as to them and Finer and Apex by the jury's verdict.

Paragraph 3(d) alleged the delivery in part of inferior and misbranded merchandise under still other contracts, for which they billed and charged the United States a price to which they were not entitled, thereby receiving a sum of money to which they were not entitled. It was alleged that these deliveries were made to seven named vessels, but the trial judge ruled that the proof only covered two of these vessels (64a). This paragraph was not related to any substantive counts charged in the indictment.

Thus it can be observed that the pleaded object of this conspiracy was "to defraud the United States" (21a), and not to violate any specific statute.

Counts 12 through 29 inclusive alleged substantive violations of Title 18, United States Code, §§1001 and 2, by the filing of false statements on various dates by defendants Gillilan, Finer, Snyder and Apex, in matters within the jurisdiction of the Navy, relating to the payment of certain invoices for Quix products sold to the Navy. These false statements allegedly related to the certificate on the invoices that it was "just and correct", which was false, in that (in a number of counts) the activity or vessel purchas-

ing the Quix was not authorized to buy it and Apex was not authorized to sell it and that the Quix was not capable of use as a flavoring in the making of ice cream, as represented in the contract (32a-54a).

Count 30 alleged a third conspiracy charge in this indictment, charging that Finer, Snyder and Apex conspired to obstruct justice, in violation of Title 18, United States, §1503, by delivering false documents in response to a subpoena *duces tecum*, all in violation of §371 of Title 18 (54a-57a).

The Record

The record in this case before the Court of Appeals consisted of the complete original record of trial in the District Court for the Eastern District of New York. For the convenience of the Court of Appeals, and now for the convenience of this Court, a printed short appendix was filed in the Court of Appeals, nine copies of which are being filed simultaneously herewith. This appendix contains the indictment, the trial court's decision on requests to charge, charge of the trial court, exceptions to the charge, oral requests to charge and exceptions before the Court, and the written requests and additional requests to charge submitted on behalf of the defendants. It also contains the judgments of conviction of the various defendants, but these were later amended by stipulation and the amended judgments are part of the original record of trial.

The complete original typewritten record of trial is being filed as the record to be used in connection with this petition. The cost of this record was borne by the Government as the trial judge granted so much of the application of petitioners Finer and Snyder for leave to proceed *in forma pauperis*, as directed that the cost of the record be paid by the Gov-

ernment under Title 28, United States Code, §753(f). The Court of Appeals thereupon dispensed with the printing requirements of this record and considered this case on the complete typewritten record.

Pre-Trial Proceedings

In advance of trial petitioners Finer and Apex moved the district court for certain relief. To the extent pertinent at this posture of the proceedings, paragraph 2 of the Notice of Motion reads as follows:

> "For an order pursuant to Rule 12(b)(2), Federal Rules of Criminal Procedure, dismissing Counts 1, 11 and 30 of the indictment, on the ground that said counts are, as pleaded, improper and unlawful in said indictment, in that they constitute an improper and unlawful pleading by the fragmentation, division and separation of a single conspiracy being charged in three separate counts in said indictment" (141a).

This motion was denied by the trial court. Since only Count 11 is now before the Court, the impact of the failure to grant this motion on this count will be presented in this petition.

The Facts

The following statement of facts is relevant only to Count 11, and to Counts 2 through 10 inclusive and to Counts 12 through 29 inclusive to the extent only that they are concerned with Count 11. Albert A. Finer was engaged in business through his firm, Apex Distributing Company, Inc., as the exclusive selling agent for Quix products, which were synthetic flavoring concentrates manufactured by Quix

Flavoring Extract Corp., owned by William Elsas. During July 1952 the Quix firm received a contract from the Navy Purchasing Office in New York authorizing the sale to designated naval activities of Quix products for the period from August 1, 1952 through July 31, 1953. This contract, known as N140s 22999B, marked in evidence as Exhibit 2, was an Open-End Indefinite Quantity Supply Contract. Although Apex was the exclusive selling agent for the Quix corporation, nevertheless, under this contract all sales were made for the account of the Quix corporation, and George E. Abbott and Company and Hal B. Grubbs and Company were listed as the exclusive selling agents under the contract (801). Abbott was located on the East Coast and Grubbs was on the West Coast. Orders received under this contract were obtained by employees of both Abbott (709-710, 788, 2185) and Apex (418) on the East Coast and by employees of Grubbs (337-338, 948) on the West Coast.

This contract enumerated the particular Naval ordering or purchasing activities which could place orders or make purchases under it, and these were designated as any Naval Supply Center, Naval Supply Depot, Naval Shipyard or Naval Station in the Continental United States. Ships were not listed as among those authorized to place orders under this contract and, according to the allegations of Count 11 and Counts 2 through 10, ships did place orders, which were accepted and filled. There is no doubt that many ships did place orders under this contract directly with the selling agents. Thereafter invoices for payment, in the name of the Quix corporation were certified as "correct and just" by employees of Abbott, Grubbs and Apex and thereupon submitted to the various ordering activities, such as the vessels. These were then certified by the supply officers of the particular ordering activity and transmitted by him for payment to the Navy Regional Accounts office in Brooklyn, New York. These invoices were audited by the Accounts

Office and then paid. The record discloses that purchases under this contract were made in all parts of the United States, on both coasts, by many activities, including more than 100 vessels (621, 801). The authority, jurisdiction and responsibility for placing these orders rested exclusively with the supply departments of the vessels, and the supply officers initiating these purchases were given instructions, regulations and directives by the Navy as to their authority and procedure in making purchases against this and all other similar contracts (340-342, 344, 418-419, 803-806, 1292-1294). It is to be noted that the orders always emanate from the Navy, not from the contractor, and the orders are always prepared by the supply personnel of the ordering or purchasing activity (370, 418, 1295-1297).

At this point it should be noted that both Abbott and Grubbs have been engaged in selling supplies and goods to the Navy for many years and that these firms have had extensive experience in the necessary procedures incident to such sales. In no instances did appellant Finer or anyone else on his or Apex's behalf instruct salesmen employed by Abbott, Grubbs and Apex to use false statements, deceit, tricks, schemes or devices in order to obtain orders from the vessels named in Counts 2 through 10 and 12 through 29 (328-331, 790-794, 808-813). There is proof that Mr. Finer visited the East Coast from California where he lived and that he did instruct the salesmen in how to demonstrate the Quix products which were packaged in plastic non-breakable acid resistant bottles (794), but no false statements as to the authority of the particular vessels to order the merchandise under the national contract (Exhibit 2) was introduced as to any of the sales made (337-344, 790-793), particularly the sales involved in Counts 2 through 10 and 12 through 29. It is fair to state that the salesmen employed by Abbott and Grubbs were far more experienced in selling supplies

and products to the Navy, and in the filling of orders received by them, than was Mr. Finer.

The office personnel of these firms also had much experience in the proper completion of the necessary invoices for payment, including the completion of the mandatory certificate that said invoices were "correct and just." There was absolutely no proof of any instructions, directions or other communication at all given by Mr. Finer to the management of Abbott and Grubbs (950-951, 1776-1778) as to how these certificates were to be completed and as to their understanding of the meaning and significance of that portion of the certificate that the invoice was "correct and just." The invoices for the orders involved in Counts 2 through 10 and 12 through 29 were completed by various office employees of Abbott and Grubbs who then signed the required certificate that said invoices were "correct and just" and then forwarded them for payment to the Navy Regional Accounts Office in Brooklyn, New York (2190-2199).

The exact wording of this certificate is as follows:

> "I certify that the above bill is correct and just and that payment therefor has not been received" (1300).

The meaning of the term "correct and just" is one of the principal questions in this case for it is the alleged falsity of these words in these certificates that forms the basic allegation of criminal conduct charged under Counts 2 through 10 (13a-21a) and 12 through 29 (32a-54a) and one of the principal forms of overt acts alleged to have been committed in furtherance of the conspiracy alleged in Count 11. See Overt Act Nos. 4, 5, 6, 7, 8, 11, 12, 13, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50 and 51 (24a-31a).

The principal definition and explanation of the term was furnished by Mr. George Brownhill, a Government expert witness (1692), qualified by it on Navy fiscal accounting practices (1692-1694). Mr. Brownhill had the following to say about the meaning of these words:

"Q. Now I ask you to look on the second page of Exhibit 38 in evidence, where you find a certificate with the words 'Just and correct,' and I ask you, sir, under the circumstances of this order was that certificate a truthful one, that this was a just and correct bill or invoice?

• • • • •

A. We would have accepted it, sir, as so.

Q. And what would be the basis of your acceptance of this certificate as 'Just and correct'?

A. We would be relying upon the submitter of this form to have meant what he signed here, sir.

Q. And to what do the words 'Just and correct' refer in that section?

A. To the billing for material delivered.

Q. And what particular as to the billing?

A. Everything with respect to the billing, sir.

Q. Tell us what you mean. Can you give us the particular details?

A. That they delivered a specific number of—

Q. Let's take this particular bill. You have a fixed bill before you.

A. 144 pints of lime, item 81, at $1.95 a pint, extended to $280.00.

Delivery were of various flavors, pints of flavoring, apparently flavoring concentrates, marked Quix, were being billed for at a specific price and we would have verified this price against the bulletin that covered it, and in every respect, as far as I can see here, it is a valid invoice.

Q. In other words, the words 'Just and correct' mean that the goods described in the invoice at the prices and of the trade name therein indicated, since there is one, were in fact delivered and that prior to the submission of this invoice payment had not been received for this delivery to that particular Naval activity; is that right?

A. Yes, sir" (1732-1733).

Further on Mr. Brownhill stated as follows with respect to the authority of the ordering activity under the type of contract involved in this case:

"Q. You testified on direct examination to a question by Miss McCann to the effect that the authority of the ordering activity on open-end type contracts is not necessarily checked in every instance when an order comes in; is that right?

A. That is correct, sir.

Q. Does the Navy Regional Accounts Office have its choice as to whether it will or will not check the authority of the ordering activity?

A. Generally I would have to say that in this type of contract we are concerned in paying what we recognize to be a valid purchase by the Navy. We are not concerned with who made the purchases. We are concerned with getting the contractor paid" (1740-1741).

Rear Admiral DeWitt C. MacKenzie, United States Navy, Supply Corps, Retired, the other Government expert in procurement procedures, had this to say about the meaning of "correct and just":

"Q. Now I ask you, sir, what do the words contained on the face of the invoice from Apex:

'I certify that the above bill is correct and just and that payment therefor has not been received.'

What do those words mean in Navy regulation parlance?

A. In Navy regulations parlance, it is a certificate by the contractor in this case, or supplier, that he has delivered the items described and the quantities described to Philadelphia, as sold to the supply officer, Naval Receiving Station, Philadelphia, under the terms of contract N140S49164B, under receiving station order 98-54, and that he has not received payment on this invoice.

Q. What Navy regional accounting office paid that voucher?

A. That was what?

Q. Exhibit 39, I guess it is.

A. This was Navy Regional Account Office at Brooklyn, New York.

Q. That is in the Third Naval District; is that right?

A. That is right.

Q. Is the Regional Account Office in Brooklyn, New York authorized to pay vouchers submitted upon deliveries made in the Fourth Naval District under contracts limited by their terms to activities and vessels in the Third Naval District?

A. They are authorized to pay for materials delivered under those contracts wherein they are designated as the paying activity.

Q. I am asking you whether they were authorized to pay the invoice which you hold in your hand, Exhibit 39 in evidence.

They either were or they were not.

A. Under the groundwork which they operated on at that time, they did, they were and did.

Q. Was it violative of any Navy regulation for them to have paid this voucher?

Can you answer that yes or no?

A. Yes.

Q. They were authorized?

A. No, no.

You asked me whether it was violative of any regulation.

Q. Yes, that is my question.

A. It would not have been violative of a specific regulation point right at that. It would have been violative of the general regulation or procedures which are that payment should be made only in accordance with the terms of the contract" (1300-1302).

* * * * *

"Q. Admiral, in giving us your definition of the term 'correct and just', as used in this required certificate made out by a contractor, you related it to a particular contract under which the delivery is made and the invoice is sent.

A. I didn't quite get the first part of your question, I am sorry.

Q. I said, in giving us your definition or understanding of the term 'correct and just', as used in the certificate on the invoice, you related to being correct and just under a contract; isn't that right?

A. Yes.

Q. Is not the same certificate required in cases where there is no underlying contract between the contracting party and the government?

A. Yes.

Q. Then frankly, in the classical application, is it not the intention of the government in requiring the certificate, 'Correct and just', to be a certificate to the effect only that the quantity of merchandise listed in the invoice at the price indicated has in fact been de-

livered to the activity ordering the same, and that there has been no payment received as of the time of the execution of the certificate?

Isn't that the real purpose of this certificate?

A. That is the principal purpose.

Q. All right" (1317-1318).

Other Government witnesses experienced in the completion and use of these certificates testified as to the meaning the words "correct and just" had for them. Mr. Hubert F. O'Reilly, a retired Navy Chief Pay Clerk, with thirty years of service in Navy Supply (413-415), testified that the words meant the following to him:

"A. It meant that an order from a certain Naval activity for these particular items had been received, that these items had been forwarded to that particular Naval activity at the price that the time—at the price that they had requested, so that the bill—they had received the goods and it was just a bill for the goods that they received.

Q. And that the goods that they received were the goods referred to in the purchase order; is that correct?

A. That is correct" (503).

Mrs. Josephine Whiting, a Grubbs office manager (1796), who signed many such certificates testified that they meant to her the following:

"Q. I show you Government's Exhibit No. 151 in evidence, and I ask you to look at the paper where your signature appears?

A. Yes.

Q. You put your signature to that certificate, did you not?

A. Yes, I did.

Q. At the time that you put your name to this piece of paper, certain things had happened in connection with that particular invoice, isn't that right?

A. I do not understand what you mean.

Q. Well, there had been a delivery of merchandise to a vessel. Right?

A. Yes.

Q. There had been a purchase order from the vessel, is that right?

A. Yes, there should have been.

Q. You certified to that effect when you signed the invoice, did you not?

A. Yes.

Q. You noticed that invoice, the certificate, the use of the words, 'I hereby certify,'—what follows?

A. 'I hereby certify the above bill is correct and just and that the payment therefor has not been received. Apex Distributing Company.'

Q. By you?

A. By me.

Q. When you put your name to the certificate, 'Correct and just,' what did you intend by that certificate?

A. That the amounts involved were correct and proper.

Q. That is all?

A. Just what it says. That it was correct and just and then the amounts involved were" (1854-1856).

The Government offered no proof to the effect that this term meant anything different or anything more than as testified to by these witnesses, although it was the theory of the Government's case on all of the substantive counts and the Count 11 conspiracy that these words were material

and related to compliance with other terms and provisions of the contracts in question.

There was no proof at all offered that petitioner Finer in any way aided, abetted, counseled, commanded, induced or procured any one of the numerous certifying persons who signed these certificates, either with respect to Counts 2 through 10, or Counts 12 through 29, or any related only to Count 11, as containing a knowingly false material statement. Firstly, there was no proof that these certificates were false; secondly, that they were false in any material respect; thirdly, that the Government relied upon them for anything other than the correctness of the count of items delivered, the prices set forth therein and the fact that there had been no prior payments.

No supply officer or other supply personnel from any ordering or purchasing activity of the Navy who bought any of these products was called as a witness to testify to the facts of the statements allegedly made to him which induced his improperly purchasing these goods and upon which false and fraudulent statements he relied. As a matter of fact, none of these procurement personnel were called at all by the Government. The duty for observing proper supply procedures rested solely on the Navy supply personnel and there was no single item of proof offered to show any impropriety, illegality or other wrong committed in connection with the procurement of the Quix products, as alleged in the indictment.

Since the Government's proof as to Counts 2 through 10 and 12 through 29 attempted to prove Finer's (and Apex's) guilt on a theory of "aiding and abetting" in the submission of vouchers for payment containing a material false entry, as to the allegation that the voucher was not "correct and just", it becomes important to search the record for any such proof. Any such proof could be used

to prove the conspiracy charged in Count 11. The fact is there is no such proof.

Moreover, as to whether "beverage base" could be sold during this period of time to Ship's Stores Afloat, at first Admiral MacKenzie testified that it was not an authorized item for such procurement (1968); however, upon being shown several invoices between Apex and different Naval activities for the purchase of "beverage base" for Ship's Stores Afloat (1974-1979, Defendants' Exhibits PPP, QQQ, RRR, SSS, TTT and UUU), under different contracts, Admiral MacKenzie then changed his testimony and stated on redirect examination that the item was proper for such procurement (1980-1982).

As to other essential allegations of Count 11, that is those relating to the sales of merchandise under Counts 12 through 29 (Paragraphs 3(a) and 3(c) of Count 11) (22a, 23a), since the jury acquitted both Finer and Apex of those counts, the Government can hardly rely upon the proof tendered in support of these substantive counts to establish the conspiracy with Snyder in Count 11. This is especially so since Snyder too was acquitted by the trial judge at the end of the prosecutor's case of any participation in Counts 12 through 29.

The remaining essential allegation of Count 11 related to the so-called substitution of inferior merchandise for Quix products to various Naval vessels on the West Coast, as set forth in paragraph 3(d) of this count (23a-24a). Although this paragraph named seven vessels to which such substitutions were made, there was only proof received as to such deliveries to two vessels (64a). The facts relating to such substitutions disclose that the term "beverage base" had come into disrepute in Navy procurement circles and that the term "flavoring concentrate", denoting a broader use for these products was adopted.

Thereupon Apex, through Finer and Snyder, sought to have all existing cases of Quix products relabelled to remove the words "beverage base", with a new large label bearing the words "flavoring concentrate" placed over the old labels. Even Mr. Elsas, the president of Quix corporation, had the packing boxes changed to reflect the change in designation of the products.

The Quix corporation had manufactured two "inferior" brands to Quix brand itself and these were called Belleaire and California Brands. These were separately packed and marked and separately shipped. Several shipments were made to Norfolk, Virginia, where they were placed in the Merchant's Warehouse under instructions to keep them stored separately from the Quix brand. Later these were trans-shipped to Bekins Warehouses in California and when they were received there were similar instructions by Finer and Snyder that they be segregated or separated from the Quix brands; however, in the relabelling process the cartons became mixed up and thereafter some cartons of Belleaire brand were delivered to two vessels, the USS Eldorado and USS Washburn, as part of shipments of Quix brand. Government's Exhibit 189 was 13 cartons from the Eldorado and Government Exhibit 192 was 3 cartons from the Washburn. Of these cartons, from the Eldorado there were 12 cases of Belleaire and 1 of Quix (2059); and from the Washburn, there were 2 cartons of Belleaire and 1 of Quix (2149). This was the extent of the entire proof of alleged substitution of the inferior brands for the authentic Quix. In this regard it is to be noted that in all the Quix corporation, Apex, Grubbs and Abbott sold approximately 17,200 cartons or cases of these products from 1951 through 1955 inclusive to the Navy, having a total sales value of approximately $1,200,000 (2229). Of this large quantity only 14 cartons of Belleaire

(which were *not* mislabelled as Quix) were found to have been delivered in place of the Quix which had been ordered.

With respect to Mr. Snyder's relationship with Mr. Finer and Apex, it should be noted that he was an independent licensed public accountant in California practicing his profession continuously since 1928, and during the period covered by this case, received $500 per month from Mr. Finer as an accounting fee. He had no ownership interest or other connection with any of Finer's corporations. He maintained his offices at Finer's place of business, being furnished office space and services in the office (2759-2768). Snyder wrote letters for Finer as to his business, but these were all at Finer's instructions or request (2768-2769). Snyder's connection with Finer's business, while intimate, was nevertheless devoid of any conspiratorial conduct and he never intended to do anything criminal on behalf of Finer or his corporations.

The Trial

The trial of this indictment commenced on October 7, 1959 and continued daily thereafter until December 1, 1959, when the case was submitted to the jury for its verdict. The jury deliberated all day on December 1, 1959, retired for the night, and returned to its deliberations on December 2, 1959, when it finally reached a verdict. In all more than 30 actual trial days were held over a two-month period, approximately 51 witnesses testified, 3159 pages of transcript were recorded and more than 300 separate exhibits many of which were voluminous, were received in evidence. Each of the individual defendants testified as a witness in his own defense at the trial.

At the close of the Government's case, the trial judge, Honorable Leo F. Rayfiel, United States District Judge,

made the following rulings for judgments of acquittal or to dismiss various counts of the indictment:

As to defendant Gillilan: Counts 12 through 29, dismissed; Counts 1 and 11, not dismissed.

As to defendants Finer and Apex (all 29 counts) and Wilshire and Melrose (Count 1): All motions denied.

As to defendant Snyder: Counts 2 through 10 and 12 through 29, dismissed; Counts 1 and 11, not dismissed.

On motion of the Government: Count 30 dismissed.

At the end of the trial the jury rendered the following verdict:

As to defendant Gillilan: Count 1—Guilty; Count 11—Not Guilty.

As to defendants Finer and Apex: Counts 1 through 11—Guilty; Counts 12 through 29—Not Guilty.

As to defendant Snyder: Counts 1 and 11—Guilty.

As to defendants Wilshire and Melrose: Count 1—Guilty.

Requests to Charge and Charge of the Trial Court

Within the time limits fixed by the trial judge both the prosecution and defense submitted written requests to charge to the Court. The trial judge held a hearing out of the presence of the jury at which he ruled upon the requests to charge (59a-76a). Insofar as they apply to the matters covered by this petition, the trial judge refused to charge, either completely or in essential part, the requests set forth below. Appropriate exceptions were noted to the refusal of the trial judge to charge as requested in writing (75a), and subsequently after the charge was delivered,

exception was noted to the failure of the Court to charge as requested (106a) and to portions of the charge as delivered (106a-116a).

The written requests to charge the jury, as to Count 11, concerned Requests Nos. 3 (last sentence only), 6, 7, 8, 14, 15, 16, 17, 18, 19, 22 and 28 (121a, 122a-129a, 130-132a, 134a-135a).

Requests Nos. 3 (last sentence only), 6, 7 and 8 related in general terms to the law of conspiracy and to a particular person's membership or participation in it. The trial court stated he would cover these matters in "general instructions" (64a), except that he refused to charge the last sentence of No. 3 which read as follows:

> "Accordingly, unless you find that a criminal conspiracy did in fact exist and that two or more of the persons named therein, that is Albert A. Finer, Charles H. Gillilan, and Joseph R. Snyder, were participants or members of said conspiracy, then I charge you and direct you that you must acquit all of the defendants of the charge of conspiracy contained in said Count 11" (121a).

Moreover, as to Nos. 6, 7 and 8 (122a-123a), an examination of the charge fails to disclose that they were given to the jury either in detail in the form requested (99a-100a), or, in substance, in any form at all.

As to Requests Nos. 14, 15, 16, 17, 18, 19, 22 and 28, the trial judge declined to charge the jury as requested therein (64a-65a).

Request No. 14 stated with respect to Count 11 "that unless you find that any (two) of the defendants (Finer, Gillilan and Snyder), knowingly, wilfully and unlawfully

conspired together and with each other" to defraud the United States as alleged in detail in this count, "then you shall acquit each of the defendants named in such count, or such of them as you find having not so conspired" (125a).

Request No. 15 stated that as a matter of law "there is no proof in this case that the defendants (Gillilan, Finer and Snyder), or any of them performed or committed any acts of deceit, misrepresentation, false statements and dishonesty against any duly constituted agencies, offices, officers and employees of the Navy so as to prevent such (of them) from complying with Navy Procurement Regulations." The request then continued that as a matter of law there was no proof in this case that the contracts between the Navy and Apex "were not performed in accordance with their terms" and that there was no proof of "fraudulent solicitation and acceptance of orders under said contracts" (126a).

Request No. 16 was a factual statement of the defendants' contentions as to the procedure whereby contracts were issued by the Navy with the firms involved in this case, setting forth a substantial summary of the testimony of Government witnesses which indicated that the contract procedures and payment procedures "is solely and exclusively within the control and jurisdiction" of the Navy, and that if the jury finds this to be the facts, "that such evidence is sufficient to raise a reasonable doubt as to the guilt of each defendant named in Count 11" (126a-127a).

Request Nos. 17 and 18 were made in terms of the proof of record at this trial. They read:

> "17. I charge you as a matter of law that there is no proof in this case that the defendants named in Count 11 or any of them made sales and deliveries of Quix products to Navy ship stores afloat under the

contract received in evidence as Government's Exhibit 2, but rather that all of such sales and deliveries were made by salesmen and representatives of the firms, George E. Abbott and Company and Hal B. Grubbs and Company. I charge you further that there is no proof in this record of any instances of false representations of Apex to naval officers to the effect that ship stores afloat could order Quix products under said contract, Government Exhibit 2. I further charge that there is no proof in this record that any of the defendants named in said Count 11 knew that said contract did not authorize, provide for or permit sales of Quix products to Navy ship stores afloat."

"18. I charge you as a matter of law that there is no proof in this case that the defendants or any of them named in Count 11 of the indictment knew full well that Navy ship stores afloat were not authorized to procure beverage base or falsely represented to Navy purchasing representatives and ship stores afloat that the said Quix products constituted a flavoring concentrate which could be used as a flavoring for ice cream and sherbets, knowing full well that it could not be so used" (127a).

Request No. 19 related to the so-called "substitution" of inferior brands for Quix brand, as alleged in paragraph 3(d) of Count 11, and to the defendants' contentions with respect to this allegation. It reads as follows:

"I charge you as a matter of law that there is no proof in this case as charged in Count 11 of the indictment that the defendants, or any of them named in said count, procured certain Navy contracts for Quix flavoring concentrate at $1.95 per pint, delivered to the USS Badoeng Strait, the USS Philippine Sea, the USS

Ajax, the USS Wright, and the USS Seiverling, pursuant to orders under said contracts, products in part labelled Apex Brand, California Brand and Bel Air Brand, which products were alleged to be inferior in price and quality and not authorized for sale under said contracts and that the defendants did bill and charge the United States of America for Quix Brand at the price of $1.95 per pint and did therefore receive a sum of money to which they were not entitled. With respect to the vessels USS Washburne and USS Eldorado, there is some evidence that in connection with purchase orders issued under contracts by said vessels, products in part labelled Bel Air Brand were delivered to said vessel. But defendants and each of them contend that they did not conspire to deliver products in part labelled Bel Air Brand to the USS Washburne and USS Eldorado in place and in stead of the Quix Brand called for in said contracts, and that if such Bel Air Brand was in fact delivered to such vessels that such deliveries were made as a result of the carelessness and negligence of the manufacturer of such products, The Quix Flavoring Extract Corp., in failing properly to mark and identify the cases containing such products as ordered and required, and by the carelessness and negligence of the Bekin's Warehouse in San Diego in failing to keep said Bel Air Brand separate and apart from the Quix Brand and by using it in filling said orders for Quix products as ordered and directed by Apex, and not by reason of any criminal conspiracy or intention to defraud the Navy in connection with the sale and delivery of said products. I charge you as a matter of law that there has been no proof adduced on this record of any conspiracy on the part of the defendants or any of them named in said Count 11 to defraud the United States of a sum of money" (128a-129a).

As to this request the Court stated that it "is denied except to the extent that I will instruct the jury that there is no proof that the defendants committed the acts set forth in paragraph 3(d) of Count 11 in the indictment so far as they involved the five vessels named in the request. And that excludes the Eldorado and the Washburne" (64a). Notwithstanding this statement, the Court nevertheless did not deliver the charge as he said he would.

Request No. 22 related to the right of the defendants to rely upon certain contract provisions as to inspection and acceptance of deliveries of goods by the Navy under purchase orders and contracts:

> "You are charged that with respect to Count 11 that the defendants were privileged to rely upon Section 22 of General Provisions contained in contracts between the Government and the other parties, which have been introduced in evidence in this case, relating to purchases made by and delivered to the USS Eldorado and USS Washburne, and in which counts it is alleged that the defendants delivered Bel Air Brand flavorings instead of Quix Brand flavorings. That said Section 22 reads as follows:
>
> > 'Notwithstanding Paragraph 5 of the General Provisions entitled "Inspection" the contractor guarantees that at the time of delivery thereof the articles provided for under this contract will be free from any defects, in material or workmanship, and will conform to the requirements of this contract. Notice of any such defect or non-conformance shall be given by the Government to the contractor within one year of the delivery of the defective or non-conforming article. If required by the Government within a reasonable time after such notice, the contractor shall

with all possible speed correct or replace the defective or non-conforming article or part thereof.'

Section 5 of said General Provisions referred to in Section 22 just read to you, insofar as the same material herein reads:

'(d). The inspection and test by the Government of any supplies or lots thereof does not relieve the contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to final acceptance. Except as otherwise provided in this contract, final acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.'

You are further charged in this connection, that even though you should find that said Bel Air Brand flavorings were delivered to said vessels, as aforesaid in Count 11 and discovery thereof was not made until said products were inspected when delivered to the Navy Supply Center, San Diego, California, as testified by the witness Shaw, and you further find that no notice of such non-conformance of said products was given to defendants within one year from such discovery then you will find the defendants named in Count 11 not guilty as charged therein of receiving a sum of money to which they were in no way entitled on account of the delivery of Bel Air Brand flavorings instead of Quix Brand flavorings" (130a-132a).

Request No. 28 reads as follows:

"The defendants contend that at the same time that the Government alleges the defendants with having unlawfully conspired to sell beverage base to ship

stores afloat under the contract, Exhibit 2, and in connection with which the defendant Finer is charged with submitting false and fictitious vouchers in Counts 2 to 10 inclusive, that the Navy was simultaneously entering into other contracts with defendant Apex Distributing Company, Inc. for the purchase of beverage base for ship stores afloat for resale, which purchases, the Government expert witness Admiral MacKenzie, testified were lawful and proper sales and authorized by Navy regulations and directives" (134a).

Requests Nos. 24 and 33 (65a, 132a, 137a-138a) related to petitioner Snyder alone.

The trial judge stated with respect to Request No. 24, that he would cover it in his charge by general instructions (64a), but examination of the charge fails to disclose any such reference to appellant Snyder as was specifically requested. See, e.g., p. 100a. This request related to Snyder's participation in the conspiracies alleged in Counts 1 and 11 of the indictment. It reads:

"You are charged that if you find from the evidence that defendant Snyder was the accountant or auditor for Finer, or his corporations, and in this sense he was associated with the defendant Finer, his corporations or with defendant Gillilan, then unless you also find that he knowingly and consciously conspired with the said Finer or the said Gillilan to commit an unlawful act or engage in an unlawful conspiracy with them, or to violate the law, as charged in said Counts 1 and 11, you shall find him not guilty" (132a).

Request No. 33, related to Snyder's contentions as to his activities in this case, as follows:

"There is proof in this case to the effect that much of the correspondence prepared, signed and mailed by the defendant Snyder and all of the correspondence prepared by the defendant Snyder, signed by the defendant Gillilan and mailed by the defendant Snyder was done so at the express instruction and direction of the defendant Finer. The defendants contend that all of this correspondence was part of the regular business operations of defendant Finer and of the various firms on whose behalf this correspondence was written and sent, and that this was all done freely and openly and without any secretiveness or concealment. The defendants further contend that the writing of this correspondence and its mailing to the various persons to whom it is addressed, including various naval activities, was done innocently and without any criminal intent and not in furtherance of any criminal conspiracy or other criminal conduct on the part of any of the defendants. I charge you that under the evidence in this case you may find the foregoing to be the facts and that such conduct may be found by you to be consistent with the innocence of the defendants under the various counts charged against them in this case" (138a).

The Decision and Opinion of the Court of Appeals

The Court of Appeals unanimously reversed the judgment of conviction of all defendants named in Count 1, and reversed the convictions of defendants Apex and Finer, in Counts 2 through 10 inclusive. The convictions of petitioners Apex, Finer and Snyder as to Count 11 only, were affirmed.

The opinion of the Court of Appeals, by Circuit Judge Learned Hand, was concurred in by Circuit Judges Charles

L. Clark and Sterry R. Waterman. As to Count 11, the Court had the following to say:

> "The jury also found the defendants Finer and Snyder and one of the corporations guilty under Count Eleven of a conspiracy to defraud the United States, §371 of Title 18. As in the case of the other Counts the judge merely read this Count to the jury and left it to them to say whether the evidence satisfied them that the conspiracy had been proved. As alleged, the conspiracy was to commit four separate 'frauds': (1) to sell Quix elsewhere than at one of the places named in the regulations; (2) to sell 'Quix' by false representation that the contracts allowed delivery to 'Ship's Stores Afloat'; (3) to represent to the buyers that 'Quix' was suitable to flavor ice cream and sherbets which they knew to be untrue; and (4) to substitute for 'Quix' another 'concentrate.' The judge's charge so far as we can see, sufficiently advised the jury of what they had to decide. It is true that in order to do so they had to resort to the Count, but the Count itself alleged the facts in such detail that no question of law was involved in applying the charge to the evidence. It is true that the first part of the conspiracy did require them to ascertain whether shipments were to be sold in places not authorized by the regulations and that involved acquaintance with what those places were; and the same was true of the second part which was for sales to 'Ship's Stores Afloat' (really only one instance of the first). However, there was no dispute about the meaning of either of those directions and therefore nothing to submit to the jury" (*infra*, pp. 49-50).

Reasons for Granting the Writ

The reasons for granting the writ of certiorari in this case relate to the sufficiency of the proof to sustain the conspiracy alleged in Count 11 of the indictment; to the improper and impermissible fragmentation of one alleged conspiracy into two separate counts; and to the refusal and neglect of the trial judge to instruct and charge the jury as to Count 11 as requested by petitioners in writing. Since it is a function of this Court to exercise supervision over the administration of federal criminal justice (*Bruno* v. *United States,* 308 U. S. 287; *McNabb* v. *United States,* 318 U. S. 332; *Marshall* v. *United States,* 360 U. S. 310), in the present posture of this case, with only one count remaining affirmed out of the 30 set forth in the indictment, it would appear that this is a proper case for review by certiorari.

1. The proof offered by the Government was insufficient to prove that petitioners conspired to defraud the United States as alleged in Count 11 of the indictment. Any analysis of the proof tendered by the prosecution to support the verdict of the jury of Count 11, as to petitioners Finer, Snyder and Apex, must perforce start with a statement of what the trial court first, and the jury thereafter, found to be *not proved.* This analysis must take the form of what evidence was submitted to the jury by the trial judge in terms of the allegations of this conspiracy count. The analysis of this count is set forth at pages 5-8, *supra.* It is to be remembered that Snyder was acquitted by the trial judge of any participation in Counts 2 through 10 and 12 through 29, inclusive, by the entry of a judgment of acquittal as to those counts at the conclusion of the Government's case (2371-2385, 2387-2388), Rule 29(a), Federal Rules of Criminal Procedure. The effect of this acquittal

was to eliminate from the jury's consideration as to Snyder, all proof tending to prove the overt acts pleaded in Count 11, which constitute the substantive counts 2 through 10 and 12 through 29 and the contracts which form the basis of these substantive counts. These are Overt Act Nos. 1, 4, 5, 6, 7, 8, 11, 12, 13, 26, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 50 and 51 (24a-32a). This would also include as to him the allegations as to paragraphs 3(a), (b) and (c) of this count, which directly relate to the substantive counts. As to Finer and Apex, their acquittal of Counts 12 through 29 inclusive requires the same result as to paragraph 3(a) and (c) and the overt acts pleaded in support thereof. The effect of the judge's ruling as to Snyder was to declare that there was *no proof* as a matter of law of his participation in the substantive counts and in the overt acts of the conspiracy count relating to the substantive counts, and, for the purposes of this conspiracy charge, it is the law of the case that there is no such proof. Since Finer and Snyder are the only ones left in this conspiracy count, in order to sustain it we must then look elsewhere in the record for proof to support and sustain it.

Of course the acquittal of substantive counts does not necessarily require that the conspiracy charged in the same indictment must also be dismissed, since the essential characteristic of the conspiracy is the illicit agreement, *United States* v. *Marcone*, 275 F. 2d 205, even where the action of directing the acquittal is that of a judge trying a case without a jury, *United States* v. *Zambardi*, 276 F. 2d 169. The conspiracy may encompass more than the substantive counts which are the pleaded objects of the conspiracy, and the conspiracy is always a separate crime in any event. *Nye & Nissen* v. *United States*, 336 U. S. 613; *Pinkerton* v. *United States*, 328 U. S. 640. Here the pleaded object of the conspiracy was "to defraud the United States", and the manifold ways that this objective was alleged were admit-

tedly beyond the scope of the substantive counts. However, the action of the trial judge in dismissing the substantive counts under the circumstances of this case does act to narrow the scope of the conspiracy and the availability of the proof necessary to prove it. *Sealfon* v. *United States*, 332 U. S. 575; *United States* v. *Oppenheimer*, 242 U. S. 85; *Williams* v. *United States*, 179 F. 2d 644, 650, affirmed on other grounds, 341 U. S. 70; *Yawn* v. *United States*, 244 F. 2d 235. Thus the examination of the facts to support the verdict as to Count 11 must be made in terms of the narrowed area of proof.

Recalling again that this conspiracy is alleged only as one "to defraud the United States" and not to violate any specific statute of the United States, either civil or criminal, the substantive violations of Title 18, United States Code, §1001, which are the charges of Counts 2-10 and 12-29, are not the purposes for which it is alleged this conspiracy was formed. For this reason too, the acquittal of Snyder of all substantive counts and Finer of Counts 12-29, requires that the proof of this case to be considered as to Count 11 must be narrowed, since the overt acts comprising these substantive counts are simply and plainly *not proved* and cannot form part of the working out of the conspiracy.

Before the record is searched to find support for the jury's verdict on Count 11, it would be well first to examine the concept of "conspiracy to defraud the United States" and to determine its applicability to the facts of this case. See, Note, *Developments in the Law, Criminal Conspiracy*, 72 Harvard Law Review 920, 944 (1959), and Goldstein, *Conspiracy to Defraud the United States*, 68 Yale Law Journal 405, 414-417 (1959). See, *United States* v. *Hirsch*, 100 U. S. 33; *Haas* v. *Henkel*, 216 U. S. 462; *United States* v. *Biggs*, 211 U. S. 507; *United States* v. *Gradwell*, 243 U. S. 476; *Hammerschmidt* v. *United States*, 265 U. S. 182.

It would appear that the opinion by Chief Justice Taft in the *Hammerschmidt* case is the principal statement of law governing this concept. He stated:

> "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.[2] It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." (265 U. S. 182, 188.)

The cases following *Hammerschmidt* have indicated that the principal attribute of such a conspiracy is the fraud aspect, and it is this concept which must be examined in this case to see if there is any proof of fraud against the United States in this case.

In *United States* v. *Byars*, 73 F. 2d 419, the Court of Appeals suggested that conspiracy to defraud the United States in a Government contracts case must involve fraud in the inducement. This Court stated:

> "We think that a conspiracy to sell contrary to an agreement or regulation not to do so, if entered after title to the goods had passed, would not constitute

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[2] The phrase, "by means that are dishonest" has been critically analyzed (68 Yale Law Journal, *supra*, pp. 430-436), and it is submitted that there is no proof in the record of this trial which authorizes any argument that such phrase was suited to the facts of this case. In submitting the case to the jury the Court did not use this phrase to explain Count 11; thus only in examining the proof may we consider it as part of the operative legal basis for determining the objects of a conspiracy to defraud.

> the crime of conspiracy to defraud the United States. . . . To conspire to break a contract with the United States or to violate its regulations, after title had passed would seem to involve no such fraud as the purchasing of Government supplies with the intention not to abide by a fixed understanding." (73 F. 2d 419, 422.)

The *Byars* case involved an alleged conspiracy to defraud the United States on the purchase of surplus government goods from the War Department by the alleged conspirators, whereas in the present case the sale of goods to the Navy is involved. This Court held in *Byars* that there was no criminal conspiracy under the circumstances.

Cases applying the *Hammerschmidt* concept to government contracts where goods are sold to different agencies of the Government are many, and in almost every instance the fraud involved related "to the deprivation of something of value by trick, deceit, chicane or overreaching." (*Hammerschmidt* v. *United States, supra*, p. 188.) In *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, the conspiracy to defraud involved the sale and delivery to a government agency of 650,000 pounds of rejected egg powder, with false representations as to testing and compliance with the terms of the contracts. In *United States* v. *Walter*, 263 U. S. 15, the conspiracy to defraud involved fraudulent claims made to a government corporation. In *Nye & Nissen* v. *United States, supra*, the fraud consisted of the submission of false invoices as to the weights, grades and prices of specified sales of eggs and cheese.

Here the only allegations of fraud which may be considered still before the Court are those relating to the delivery of inferior products to two vessels under contracts calling for Quix (paragraph 3(d) of Count 11). All the other

subparagraphs of paragraph 3 have been dismissed by the Court's action on the substantive counts. The concept of illicit or criminal agreement as to these allegations is not in the case, and in spite of the comprehensive pleading of Count 11, only paragraph 30(d) remains as to it.

With respect to this paragraph, or to the whole concept of conspiracy encompassing it, it is submitted that there is no proof that Finer and Snyder conspired to defraud the United States by delivering or causing to be delivered to the vessels ElDorado and Washburne 14 mislabelled cases of goods out of a total of 17,200 cases delivered to the Navy. The proof amply justifies a holding that these mislabelled cases were delivered in error, by the carelessness of Bekins Warehouse in California, or the inadvertence and carelessness of Merchants Warehouse in Norfolk, where, in spite of several letters of caution or warning to them from the petitioner Apex to keep the different brands of merchandise segregated, in order to avoid confusion and mistakes in deliveries under the contracts, there was a mix-up and confusion of these goods. At best the ancient maxim *de minimis non curat lex* should apply to the delivery of 14 mislabelled cases under these circumstances. If not, however, the fact that there is such a paucity of proof of fraud on this item shows a clear failure of proof of criminal intent, this should act to require a reversal of the conviction under Count 11. Simply stated the objective fraud charged has not been proven.

Even if the complete set of allegations of Count 11 were to be considered to prove this alleged conspiracy, the proof is also such as to negative any conspiracy. Giving the Government the best view of the evidence (*United States* v. *Brown*, 236 F. 2d 403, 405), it is clear that the objects of the alleged conspiracy, its method of accomplishment, and the proof necessary to sustain it do not

measure up to the standards set for such cases. As to paragraph 3(a), the sale of Quix products outside the Third Naval District on contracts which did not authorize it, the testimony of Mr. Brownhill and Admiral MacKenzie clearly shows that such sales are not acts of fraud against the Government, since the Navy received what it paid for insofar as the products are concerned, and that this is the only material matter in these sales. (See pp. 16-19, *supra*.) As to paragraph 3(b), the sales under the "National Contract" (Exhibit 2), Mr. Snyder had no part in these transactions, as the trial judge found, and hence it was not part of the conspiracy. In any event, it was not material to the purposes of this contract for the same reason as set forth as to paragraph 3(a). As to paragraph 3(c), the sale of "flavoring concentrate" to be used for ice cream and sherbets, the contracts themselves used the term "cold confection", a broader term than ice cream and sherbets, as defined by Government witnesses, and some contracts separated ice cream flavors, at much higher prices, from the regular Quix at $1.95 per pint. Moreover, the jury acquitted Finer of the substantive counts on these charges, and the judge acquitted Snyder thereof, thus eliminating this paragraph from this conspiracy.

2. Count 11, standing alone, constitutes part of an improper and impermissable fragmentation of one alleged conspiracy into two counts, i.e., Counts 1 and 11 of the indictment. The reversal of petitioners' conviction under Count 1 therefore requires a reversal of their conviction under Count 11. As indicated *supra*, p. 10, petitioners moved in advance of the trial to dismiss Counts 1 and 11 of the indictment, charging an improper "fragmentation" of a single conspiracy, having diverse objects, into two separate conspiracies among the identical persons at the same time, pleading identical overt acts as to both counts, as operative

in both conspiracies. See pp. 139a and 141a of Appellant's Appendix. In support of this motion appellants argued the cases of *Braverman* v. *United States*, 317 U. S. 49; *United States* v. *Cohen*, 197 F. 2d 26, 29; *United States* v. *Mazzochi*, 75 F. 2d 497. This motion should have been granted, and it was prejudicial error not to do so. See for example that paragraph 1 of Count 11 incorporates by reference into this Count all of the allegations of paragraphs 1 and 2 of Count 1, and that paragraph 1 of Count 1 contains allegations as to Admiral Gillilan's status and paragraphs 2 (b), (c), (d) and (f) relates to matters irrelevant to Count 11, although brought into it. Overt Acts Nos. 1, 6, 8 and 13 of Count 1 are identical with Overt Acts Nos. 19, 22, 24 and 27 of Count II. There is surely here a prohibited fragmentation of one conspiracy charge into two counts only for purpose of prosecution. See *United States* v. *Samuel Dunkel & Co., supra.*

Under the circumstances of the jury's verdict, the error is more obvious since Admiral Gillilan was acquitted of Count 11, but convicted of Count 1. The reversal of petitioners' conviction under Count 1 would surely require that their conviction under Count 11 should now be reversed, so that the error of trying them for two counts instead of one may be corrected and the Government then be required to elect as to which of these two counts it wishes to proceed.

3. The trial court committed prejudicial error in refusing to charge the jury as to Count 11 as requested in writing and, at the conclusion of the court's charge, orally when exceptions to the charge and additional requests to charge were noted in the record. It is clear from the analysis of the charge of the court, as to Count 11 only, for the purposes of this petition, as set forth in great detail,

supra, pp. 24-32, that none of the contentions of the petitioners were stated to the jury. Their view of the state of the evidence was not given, for the reason stated by the court that it had decided it would be impossible to review the evidence, and thus the findings which the jury must necessarily make before convicting these petitioners under Count 11, were not stated to them.

This is not the case where several hundred repetitious requests were submitted to the Court, as in *United States* v. *Cohen*, 145 F. 2d 82; but rather only 33 requests were submitted, although some of them were rather long and detailed. The Court should have given the substance at least of these requested charges, although not necessarily in the form or language requested. (*Sugarman* v. *United States*, 249 U. S. 182; *United States* v. *Kushner*, 135 F. 2d 668, cert. den. 320 U. S. 212). It is clearly error not to give the jury the defendant's theory of the case where it has any support in the record. *United States* v. *O'Connor*, 237 F. 2d 466, 474, footnote 8, and cases cited therein. *Levine* v. *United States*, 261 F. 2d 747, 748-749; *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, 282 F. 2d 137, 140.

Even where the trial court stated he would charge "in substance" a particular request, examination of the charge discloses a failure to give the charge. Due exception to this was noted in general terms (106a). Under all of the circumstances it is apparent that the charge of the trial court was inadequate and improper.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted.

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June 2, 1961

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 128—October Term, 1960.

(Argued December 9, 1960 Decided April 5, 1961.)

Docket No. 26331

UNITED STATES,

Appellee,

—v.—

CHARLES H. GILLILAN, ALBERT A. FINER, JOSEPH R. SNYDER, APEX DISTRIBUTING COMPANY, INC., WILSHIRE SALES ASSOCIATES, INC. and MELROSE CORPORATION,

Appellants.

Before:

CLARK, WATERMAN and HAND,

Circuit Judges.

On appeal by the defendants from a judgment holding the appellants guilty as to certain of eleven counts in an indictment for conspiracy and for the presentation of fraudulent claims to the United States Navy.

DANIEL H. GREENBERG, *for the appellants.*

MARIE L. MCCANN, *for the appellee.*

HAND, *Circuit Judge*:

These appeals arise upon a judgment of conviction before Judge Rayfiel upon eleven counts of an indictment, of which Counts One and Eleven were for "conspiracy" and Counts Two to Ten were for "fraudulent" invoices paid by the Navy. There were a number of other counts which for one reason or another were dismissed. We shall first discuss Count One, then collectively Counts Two to Ten, and finally Count Eleven.

Count One charged a conspiracy under §371 to violate §281 of Title 18, U. S. Code, between the defendants, Gillilan, Finer, Snyder and three corporations controlled by Finer, in which they agreed that Gillilan, a retired admiral in the United States Navy, should receive "compensation" for services rendered by him in relation to contracts with the United States for the sale or purchase of "concentrated flavorings." Finer sold the "flavorings" to the Navy through the corporations, Snyder was his accountant and Gillilan was employed by Finer under various titles. The business was carried on by means of what were called "open-end" contracts, which provided the total quantity of "concentrates" that the Navy might demand under the contract and the prices at which they would be delivered, but did not bind the Navy until it later ordered the supplies. The contracts were divided into two groups: "Ship's Stores" contracts, which were for goods to be resold to members of the crew, and "Provisions"—"concentrates" that the Navy used in preparing the meals served to the crews. "Ship's Stores" were themselves divided into two groups—"Ship's Stores Ashore," which were sold at named places on land, and "Ship's Stores Afloat," sold on board a named ship to the crews individually for their personal use. The reason for these divisions does not appear and need not concern us, except

that the regulations required separate contracts for each kind of transaction.

Count One alleged that it was part of the conspiracy that Gillilan should "receive compensation for services rendered * * * in relation to contracts * * * in which the United States was a party"; and that he was to "represent Apex and Melrose and other concerns in the sale of concentrated flavorings to the United States." The judge in his charge to the jury only read large passages from this Count and then concluded with a quotation from the final paragraph of the Count that the conspiracy contemplated that Gillilan should be compensated "for his services in soliciting and negotiating contracts * * * for the sale of Quix concentrated flavorings, and other products." He then read the substance of the first paragraph of §281, but no part of the second paragraph, and Gillilan excepted to the omission.

The first sentence of the second paragraph, standing alone, protected Gillilan from any liability, because he was a "retired officer not on active duty"; but there remained the question whether the second sentence of that paragraph did not deprive him of this immunity. The exact words of that sentence provide that a retired officer will be liable as though he were in the active discharge of his duties, if he "represent any person in the sale of anything to the Government through the department in whose service he holds a retired status." That obviously means that, although a retired officer is permitted to receive compensation "in relation to any * * * contract," he will nevertheless violate the section if he is "representing" someone else in the "sale" of anything to the United States "through" his former department. In the case at bar this language demanded a decision whether what Gillilan did was to "represent" the seller in "sales" to the United States.

The judge did not attempt to define what conduct constituted "representation" for sale, yet some definition was necessary. For example, an officer could hardly be said to "represent" the seller if he merely delivered goods to the Navy which his employer had sold. We need not say whether only those officers "represent" a seller who have authority to fix some of the terms of sale; but certainly the statute requires some definition of the meaning of the words which may not be left to the jury. Gillilan expressly raised the point, and the jury was left without instruction as to what was the necessary share in the negotiations that led to the sales. We do not hold that the evidence precluded a finding that he did "represent" the Navy "in the sales" (*Sealstrom* v. *United States*, 177 F. Supp. 948, 951 (C. C.)); but in a criminal prosecution, which this was, it was essential to advise them what kind of participation must be proved. The judgment in Count One must be reversed and the cause remanded for a new trial.

Next is the appeal by Finer and one of his corporations from Counts Two to Ten inclusive, which were all cast in the same model and were for violations of §1001 of Title 18, i.e., making false statements to an "agency" of the United States. The Counts covered shipments of "flavorings" sent by Finer and his corporations, payment for which after delivery was procured by certificates of agents of the sellers that the bills or invoices presented were "correct and just." The basis of the charge in each case was that the delivery of the goods had been to "Ship's Stores Afloat" contrary to the contracts of purchase which had required delivery ashore. The bills in all instances had correctly shown consignments to specific ships, together with the number of the contract under which the shipment was made. In each case the certificate was alleged to be false within §1001, and designed to "cover up" the irregularity of the purchase. The judge, as in the case

of Count One, again merely read the Counts as they were alleged in the indictment and left it to the jury to say whether the crime had been proved. As a matter of interpretation we have no doubt that the phrase "correct and just" should be understood as meaning that the claims were lawful and should be paid. Yet it appeared on their face that they violated the regulation which forbade sales of such goods to "Ship's Stores Afloat."

It is true that there was no specific evidence that the entries on the "invoices" had been intended to "cover up" the fact that the deliveries were unauthorized, and perhaps they had been, but it was essential that the jury should be told that such had been in fact the intent. We do not forget that the judge did make a general statement as to the meaning of the words "unlawfully" and "fraudulently," applicable to his whole charge, but it seems to us that it was necessary to go further and be more specific as to these Counts. The statute, §1001, expressly makes it a part of the crime "knowingly and wilfully" to "cover up" a material fact, or to "use false writing or document knowing the same to contain any false, fictitious or fraudulent statement," and this required that the jury be told unequivocally that the contradiction was a deliberate fraud. The charge did not tell the jury that they must find that the invoices had been put in for that purpose. The judgment as to these Counts is reversed and they are remanded for a new trial.

The jury also found the defendants Finer and Synder and one of the corporations guilty under Count Eleven of a conspiracy to defraud the United States, §371 of Title 18. As in the case of the other Counts the judge merely read this Count to the jury and left it to them to say whether the evidence satisfied them that the conspiracy had been proved. As alleged, the conspiracy was to commit four separate "frauds": (1) to sell Quix elsewhere than at one

of the places named in the regulations; (2) to sell "Quix" by false representation that the contracts allowed delivery to "Ship's Stores Afloat"; (3) to represent to the buyers that "Quix" was suitable to flavor ice cream and sherbets which they knew to be untrue; and (4) to substitute for "Quix" another "concentrate." The judge's charge so far as we can see, sufficiently advised the jury of what they had to decide. It is true that in order to do so they had to resort to the Count, but the Count itself alleged the facts in such detail that no question of law was involved in applying the charge to the evidence. It is true that the first part of the conspiracy did require them to ascertain whether shipments were to be sold in places not authorized by the regulations and that involved acquaintance with what those places were; and the same was true of the second part which was for sales to "Ship's Stores Afloat" (really only one instance of the first). However, there was no dispute about the meaning of either of those directions and therefore nothing to submit to the jury.

There is no inevitable necessity in a criminal case that the judge shall state the evidence in his charge—"marshal" it, as it is called in England. When as here the evidence is extremely complicated, it is a question for him to decide how much a detailed restatement in his charge will clarify the issues. We held in *United States* v. *Cohen,* 145 Fed. (2) 82, 92 that it was enough if he "stated the prosecution's charges in detail, and told the jury that those of the accused who had taken the stand, had denied their guilt." We went on to say that if "the judge had once embarked upon a consideration of the transactions in detail, he would have committed himself to a discussion of them all; otherwise he would surely have laid himself open to the charge of undue emphasis. On the other hand, to undertake such a Herculean task would not have helped the jury, but merely would have added to the weight of verbiage that

they had already been called upon to bear." Amid the extraordinary plethora of requests actually made there was none asking him to define the authorized delivery places, and he was justified in assuming that both sides agreed as to what they were. The verdict should not be disturbed.

Judgment on Count One and Counts Two to Ten reversed and a new trial ordered; judgment on Count Eleven affirmed.

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No. 130

In the Supreme Court of the United States

OCTOBER TERM, 1961

APEX DISTRIBUTING CO., INC., ALBERT A. FINER AND JOSEPH R. SNYDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 45–51) is reported at 288 F. 2d 796.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1961. On May 4, 1961, Mr. Justice Harlan granted an order extending the time of petitioners to file their petition for a writ of certiorari to and including June 4, 1961. The petition of a writ of certiorari was filed on June 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the petitioners' convictions on count eleven of the indictment.

2. Whether that count charged a conspiracy separate from that charged in count one, as to which the convictions were reversed.

3. Whether the trial court properly refused petitioners' requested instructions as to count eleven.

STATUTE INVOLVED

18 U.S.C. 371 provides in pertinent part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

The only count before this Court is count eleven of the indictment returned in the United States District Court for the Eastern District of New York. That count charged a conspiracy to defraud the United States (a) of a sum of money; (b) of its right to have Navy procurement regulations complied with free from impairment by deceit and dishonesty; and (c) of its right to have contracts performed in accordance with their terms without fraudulent solicitation and acceptance of orders (App. 21–22). The convictions of petitioners on this count were affirmed by

the Court of Appeals for the Second Circuit.[1] The convictions on other counts were reversed because of an error in the charge.

The count was based on the sale by Apex Distributing Company, Inc. of a concentrated beverage flavoring base, called Quix, to the United States Navy, for use in making cold drinks. Apex, which was owned by petitioner Finer (R. 2419), was the sole distributor of Quix (R. 154). Petitioner Snyder was the accountant for Apex and Finer (R. 2478).

The pertinent facts may be summarized as follows:

1. *The Navy Procurement System.*

Contracts for food supplies, which the Navy classifies as either Provisions or Ship's Store Stock, are let by Navy Purchasing Offices throughout the United States (R. 1199–1200, 1216, 1222). From Provisions comes food for the subsistence of Navy personnel, served free of charge in the General Mess (R. 1202–1203). Ship's Store Stock provides food for resale through commissaries and ship's stores ashore and afloat. A ship's store afloat is a retail outlet on a vessel, similar to a drugstore with a soda fountain (R. 1202–1203). Contracts for Provisions items, such as beverage base (R. 1338–1339, 1350), are let by Navy Purchasing Offices on a low bid basis following advertised invitations for bid (R. 1216–1217). These items must conform to military specifications and pass quality tests by Navy laboratories (R. 883, 1217–1218).

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[1] Petitioner Finer received a sentence of eighteen months, petitioner Snyder, a sentence of six months, and petitioner Apex, a nominal fine.

All of the contracts in this case, known as Open-End, Indefinite Quantity Supply Contracts (R. 1219), were for Ship's Store Stock, and were let as a result of negotiation between the Navy and the contractor, or in response to invitations for bid (R. 1221–1223). By their terms, the contractor was bound to deliver his goods at set prices up to an estimated maximum amount as ordered by the Navy (R. 1392–1394). If the Navy ordered more than the estimated maximum and the contractor accepted the orders, the Navy was obligated to pay the contract price (R. 1392–1394). All but one of the contracts (Ex. 2) were for ship's stores afloat and called for delivery within a specified geographic area comprising a Naval District (Exs. 19–27). They ran for a period of three or four months and were called quarterly, or local, contracts (R. 1244). Six of these classified Quix as "K–4 Fountain Supplies" (Exs. 19–23, 26).[2] Government's Exhibit 2, known as a National Contract, called for the delivery of Quix Beverage Base to shore installations within the continental United States, ran for a period of one year, and categorized Quix as "S–1 Groceries."

A ship's supply officer, who was responsible for obtaining both provisions and Ship's Store Stock for his vessel (R. 1292–1293), would procure them by placing orders under existing contracts covering the Naval District in which his ship was located. He would

[2] "K–4" was the Navy Supply category for ice cream flavorings (which could be procured by ship's stores afloat). Beverage base fell under the category of "S–1" (R. 1263–1264; Ex. 2).

learn of the existence of the contracts either from Contract Bulletins furnished him by the Navy (R. 1245–1247) or directly from salesmen who solicited orders aboard ship (R. 1249).

All the contracts required that, after delivery, the contractor certify his bill to be "correct and just," and send it to the ordering Naval activity for forwarding, together with proof of receipt and acceptance, to a designated Navy Regional Accounts Office for payment (R. 1401–1403, 1729). When an invoice was received, the Navy Regional Accounts Office, New York, checked to see that the contract was in existence, that the products listed, the prices, and totals were correct, that there was proof that the product had been delivered and that the "correct and just" certification on the invoice was signed (R. 1705). It did not verify whether the ordering activity (for example, the ship) was authorized to order under the contract (R. 1706). As a practical matter, an apparently valid invoice under contracts such as these, for ordinary day-to-day requirements of the Navy, was not thoroughly reviewed by the Navy Regional Accounts Office (R. 1355–1356, 1706, 1740–1741), and it relied principally on the contractor's integrity in submitting the invoice (R. 1732).

2. *The Fraud Charged.*

In count eleven, the government charged that, in furtherance of the conspiracy to defraud, petitioners sold and delivered Quix to vessels afloat, under the National Contract, knowing that ship's stores afloat were not authorized to procure beverage base; sold and delivered Quix to vessels outside the Third Naval

District[3] under New York quarterly contracts; falsely represented that Quix was a "flavoring concentrate" which could be used as a flavoring for ice cream and sherbets; and, having obtained contracts for Quix, delivered to certain vessels products inferior in price and quality which were billed as Quix.

3. *Evidence Adduced at the Trial.*

a. *Evidence of fraud under the National Contract.*

Although the National Contract was in the name of Quix Flavoring Extract Corporation, the manufacturer of Quix, the real party in interest to it was Apex (R. 50–56, 2395). Petitioner Finer negotiated the contract (R. 2395) and selected the sales representatives (R. 2397) to whom he gave copies of the contract (R. 2402). Apex received copies of the invoices which were prepared in billing the Navy (R. 2185–2186, 2398–2399; Ex. WWW).

Under the National Contract (Ex. 2) at least eighty-eight unauthorized sales, representing approximately $79,000, were made to ships (Ex. WWW). The copies of invoices received by Apex showed this fact. Apex not only accepted payment for, but encouraged, such sales (R. 55–56, 2503–2504), although Finer knew that sales to ships were unauthorized under the contract (R. 1606–1607; Ex. 140).

b. *Evidence of fraud under Third Naval District contracts.*

In 1954, petitioners negotiated three contracts for the sale of Quix to ship's stores afloat within the territorial limits of the Third Naval District (Exs.

[3] The Third Naval District generally encompasses the Port of New York area (R. 1430).

19–21). Petitioners were aware of the geographic limitations from their copies of the contracts (R. 1419). Nevertheless, petitioner Finer accompanied the salesman who made some of the unauthorized sales to ships outside of the Third Naval District (R. 501, 503–504, 507), and was present when an order was solicited, under a Third Naval District contract for ship's stores afloat, from the Philadelphia Navy Yard which was not a ship's store afloat (R. 473–477). Finer stipulated that he was aware that the shipyard was located in the Fourth Naval District (R. 2540).

Petitioners provided their salesmen selling under these contracts with a price sheet (Ex. 58) which listed the items available, the address to which orders should be sent, the effective dates of the contract, and the contract number, but not the activities which were authorized to order under the contract (R. 584, 593–597, 499–500; Exs. 58, 59). Since this information gave no warning to supply officers that they were being asked to order under a local contract (R. 1427), Apex was able to induce ships which were not within the territorial limits described in these contracts to order Quix. At least eleven sales made under these three contracts were unauthorized because deliveries were made outside the Third Naval District (Exs. 39, 42, 44–46, 50, 52–56).

c. *Evidence of false representation as a "flavoring concentrate."*

Petitioners had been informed by the Navy that ship's stores afloat were not authorized to procure

beverage base (R. 361–362, 2243–2244, Ex. 210). The price schedule which they submitted to the Navy Purchasing Office, New York, when negotiating for the first quarterly contract, therefore, described Quix as "flavorings for making ice cream, sherbets and cold confections" (Ex. 62). The Navy Purchasing Office adopted the language which Apex submitted (R. 879, 1343), thinking that it was contracting only for ice cream flavorings (R. 877–878, 906).[4] The commanding officer of the Navy Purchasing Office testified that he would never have allowed beverage base to be included in these contracts since it was not an authorized item for ship's stores afloat (R. 882–883). Petitioners instructed their salesmen to use the term "cold confection" rather than "beverage base" in selling, and said the product could be sold as a ship's store item and then transferred to the general mess account (R. 584, 592, 402). Such a transfer would be in violation of Navy regulations (R. 1236), a fact of which petitioners were also aware (Exs. 193, 194, 195). By avoiding the phrase "beverage base" when dealing with ships (R. 584), Apex was able to sell to ship's stores afloat under the purported authority of these ice cream flavoring contracts and to bill the Navy on behalf of Apex for items which, regardless of their nomenclature, were intended primarily for cold drinks in the general mess (R. 654), and which could not be used for making ice cream (R. 112, 114).

[4] In addition to the specific description, the Apex schedule (Ex. 62) classified Quix as "K–4," the Navy supply category for ice cream flavorings.

d. *Evidence of fraudulent substitution of inferior brands for Quix.*

The manufacturer of Quix made two other brands of beverage base, California and Bellaire (R. 5–6). Both of these were inferior to Quix in price and quality, and both had a much shorter shelf life (R. 36–40, 261–262).

Petitioners stored these brands with the Bekins Van and Storage Company, a public warehouse which also stored Quix (R. 1010–1014, 1016–1017; Exs. 83, 84). When these brands left the manufacturer's plant for delivery to Apex, they were packed in boxes labeled California and Bellaire, respectively (R. 99–100). On March 15, 1953, petitioner Snyder authorized Bekins in writing to relabel cases containing California brand, and enclosed the necessary labels (Exs. 85, 90). He mailed a new supply of Quix labels on June 17, 1953, and instructed Bekins to relabel two new shipments of California brand (Ex. 92). In August, September, and October 1953, another series of letters by Snyder informed Bekins of the arrival of Bellaire brand (Ex. 98), ordered the relabeling of various shipments of this brand (Exs. 99, 105), and requested that the relabeled Bellaire and a new shipment of Quix be released before other stock (Ex. 104).

Although Finer left the details of inventory to Snyder (R. 2588–2589), he checked his stock on his periodic visits to Bekins (R. 1064, 1162). On one of Finer's numerous visits to Bekins (R. 1012, 1129), he made the initial request that Quix labels be placed on California boxes, stating that Quix and California

were the same product (R. 1014–1015, 1118). He made a similar request when the Bellaire cases arrived at Bekins, promised written authorization for the relabeling, and gave instructions that the Bellaire stock record cards kept by Bekins should be closed out to the Quix records (R. 1023, 1061–1062, 1106–1108).

In late 1954 and early 1955, relabeled cases containing Bellaire beverage base were delivered to naval vessels which had ordered Quix under quarterly contracts obtained by Apex from the Navy Purchasing Office, Los Angeles, for "flavoring for making ice cream, sherbets and ices" (R. 1889–1892; 1906–1908; Exs. 23, 26). Physical evidence of this substitution as to two vessels was introduced at the trial (Exs. 189, 192). The net result was that Apex billed the Navy for Quix at $1.95 a pint, on invoices certified to be "correct and just," under a contract for an apparently legitimate product for use in ship's stores afloat, and delivered a product which was not only unauthorized, but was inferior in price and quality.

ARGUMENT

Petitioners would have this Court, in the exercise of its power of supervision over the administration of criminal justice in federal courts, reverse their convictions on count eleven, on the grounds of insufficiency of proof, improper fragmentation of a conspiracy, and error in the trial court's refusal to charge certain of their requested instructions. None of these issues has merit and none presents a question worthy of review by this Court.

1. As appears from the facts summarized in the Statement, *supra*, the evidence was ample to support the verdict of the jury that petitioners knowingly engaged in a conspiracy to defraud the United States in many ways in the sale of Quix.

Petitioners' argument that the evidence was insufficient is in large part based on the disposition of the substantive counts. Counts two through ten charged substantive offenses of concealment through trick in violation of 18 U.S.C. 1001 in connection with invoices certified as "correct and just" under the National Contract. The essence of the charge was that the invoices were fraudulent in that the defendants knew that the vessels were not authorized to order and that Apex was not authorized to fill orders from these vessels. These counts were dismissed as to petitioner Snyder by the trial court, and as to Finer and Apex the convictions were reversed by the court of appeals for error in the charge. Counts twelve through twenty-nine charged similar violations of 18 U.S.C. 1001 in connection with invoices for sales under the three Third Naval District contracts. As to these counts, there was a dismissal as to Snyder by the trial court, and an acquittal by the jury as to Apex and Finer. Petitioners argue that to give effect to such action on the substantive counts it is necessary to disregard all the evidence relating to these counts in connection with the conspiracy to defraud charged in count eleven, leaving only the evidence of the substitution of inferior brands to support that count.

This argument is specious. As to the counts which were reversed by the court of appeals (counts 2–10),

although it was one of petitioners' contentions that the certifications of the invoices did not constitute an attempt to cover up unauthorized deliveries under 18 U.S.C. 1001, the court of appeals agreed with the government that the certifications might be a means of covering up; it held only that the jury should have been more specifically instructed with respect to the specific nature of the charge (Pet. 49). Thus, neither the trial court nor the court of appeals has held that the evidence on these counts as to petitioners Finer and Apex was insufficient. As to petitioner Snyder, even though the charges against him on these counts were dismissed, this of course does not imply that he was not sufficiently connected with the fraud charged in these counts to be guilty of conspiracy. As to the counts on which petitioners Finer and Apex were acquitted (counts 12–29), the fact that the trial court or the jury found that the particular invoice which formed the basis of a substantive count was not, in itself, fraudulent concealment by trick does not mean that this portion of petitioners' entire operations had to be disregarded in determining whether they had entered into a conspiracy to defraud the United States.

Irrespective of whether the invoices did themselves fall within the purview of Section 1001, the evidence as to the methods of sale was pertinent on the conspiracy charge as part of the whole picture of a deliberate, well-planned scheme to sell Quix by numerous fraudulent methods. Petitioners admit (Pet. 35–36), as they must, that the charge of conspiracy to defraud the United States went beyond the scope of

the substantive counts. The acquittal or reversal on the substantive counts thus does not affect the conviction on the conspiracy count. *United States* v. *Marcone,* 275 F. 2d 205 (C.A. 2).

Moreover, even on petitioners' theory that the conviction must rest on the evidence of substitution of brands, the proof was sufficient to sustain their conviction. While it is true that the government was able to prove only two instances of actual substitution to the satisfaction of the trial court, there is nothing to substantiate petitioners' statement (Pet. 39) that only fourteen out of 17,200 cases were so substituted. On the contrary, the record is replete with evidence that they conspired to substitute many more than these fourteen cases. A thousand and one cases of Bellaire and five hundred and sixty-nine of California were manufactured and sold to Apex (R. 40–41; Exs. 28, 29). Of these the government proved specific instructions by Apex through Finer and Snyder to change the labels on more than five hundred eighty-three cases (Exs. 90, 92, 99, 105). Finer himself testified that he ordered all the cases in Merchants (a Norfolk, Virginia, warehouse used by Apex) and Bekins relabeled (R. 2444). The letters to Bekins, which instructed relabeling, and cautioned the warehouse to make sure the white label was completely covered by the yellow label, speak for themselves (Exs. 90, 99, 105). Regardless of how many substituted cases the government proved were delivered, there was more than sufficient evidence of a conspiracy to defraud by substitution, a question of fact resolved in favor of the government by the jury.

2. Petitioners argue (Pet. 40–41) that one conspiracy was improperly "fragmented" in counts one and eleven, and urge that their pretrial motion to dismiss count eleven on this ground should have been granted. Count one (as to which the convictions were reversed by the court of appeals on the basis of error in the instructions) charged a conspiracy to violate 18 U.S.C. 281, by having Charles H. Gillilan, a retired Rear Admiral of the United States Navy, Supply Corps, receive compensation for services rendered in relation to contracts and other matters before the Department of the Navy by representing Apex, Melrose, and other concerns in the sale of concentrated flavorings to the Navy. On its face, it is separate from and additional to the conspiracy to defraud in the actual making of sales, as charged in count eleven. The two conspiracies extended over different periods of time, and had different parties and different objects. The fact that a few of the overt acts committed in pursuance of the two conspiracies were the same is therefore immaterial. It was not necessary to the success of the conflict-of-interest conspiracy that the government be defrauded in any way, and conversely, the government could have been defrauded without any violation whatsoever of the conflict-of-interest laws by Admiral Gillilan. Petitioners could have been convicted on one and not the other count without any inconsistency in the jury's verdict.

None of the cases cited by petitioners (Pet. 41) is in point. This is not the situation of *Braverman* v. *United States*, 317 U.S. 49, where there was one

general agreement to operate a still which involved the violation of a number of statutes. Here the objectives of the conspiracy were essentially different in character. The courts of appeals cases cited by petitioners are equally inapplicable. Indeed, in *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894 (C.A. 2), certiorari denied, 340 U.S. 930, the court recognized that two conspiracies could overlap, and affirmed appellants' convictions on both.

3. Petitioners' contentions concerning the trial court's instructions (Pet. 41–42) are clearly without the importance calling for this Court's review. Moreover, the trial court properly rejected petitioners' requested instructions. Since it is the court's province to decide upon the style and form in which it charges the jury (*Henderson* v. *United States,* 218 F. 2d 14, 18 (C.A. 6), certiorari denied, 349 U.S. 920), it need not adopt the exact language of requested instructions, *Sugarman* v. *United States,* 249 U.S. 182, 185; *United States* v. *Kushner,* 135 F. 2d 668, 674 (C.A. 2), certiorari denied, 320 U.S. 212. A court is not required to give instructions which are in any respect erroneous (*Kreiner* v. *United States,* 11 F. 2d 722, 725 (C.A. 2), certiorari denied, 271 U.S. 688) and it need not sift out the correct from the incorrect parts (*Aeby* v. *United States,* 206 F. 2d 296, 299–300 (C.A. 5), certiorari denied, 346 U.S. 885), or give instructions emphasizing a certain phase of the evidence (*Samish* v. *United States,* 223 F. 2d 358, 366 (C.A. 9), certiorari denied, 350 U.S. 848). In the light of these general principles, an analysis of the court's

action on the requests shows that petitioners' contentions are without merit.

Request Numbers 3, 6, 7, 8, and 14 (Pet. 25) on the general nature of conspiracy, insofar as they were correct, were charged in substance (see App. 90, 99–100, 105). Request Numbers 15–19 were requests to charge as a matter of law on defendants' version of the evidence (Pet. 26–29) and were therefore properly refused. Request Number 22 (Pet. 29) was confusing and erroneous on its face. Request Number 28 (Pet. 30–31) was erroneous, emphasized a particular phase of the evidence, and raised an issue not before the jury. As to the requests relating to Snyder alone, Request Number 24 (Pet. 31) was charged in substance (App. 100–101); Request Number 33 was a summary of the evidence, and as to the law, was in effect a negative statement of what the court charged positively (App. 116–117).

Petitioners' principal contention as to the instructions seems to be that the trial court failed to summarize the evidence for the jury. But the court was under no obligation to do so. As the court of appeals said in *United States* v. *Cohen,* 145 F. 2d 82, 92, 93 (C.A. 2), certiorari denied, 323 U.S. 799:

> If the judge had once embarked upon a consideration of the transactions in detail, he would have committed himself to a discussion of them all; otherwise he would surely have laid himself open to the charge of undue emphasis. On the other hand, to undertake such a Herculean task would not have helped the jury, but merely have added to the weight of verbiage that they had already been called upon to bear

> during twelve days of summing up by counsel. Moreover, it would not have been humanly possible to do so without either making serious slips, or of seeming to favor one side or the other * * *. It is strange to hear an accused complaining of such a failure; we may be assured that, if the power had been used, the complaints would have been louder, and almost certainly better grounded.

The jury had the benefit of summations by counsel for the defense collectively for over three hours and by counsel for the government for over two hours. The evidence therefore was thoroughly marshalled for the jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 130

APEX DISTRIBUTING CO. INC., ALBERT A. FINER and JOSEPH R. SNYDER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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In the

Supreme Court of the United States

October Term, 1961

No. 130

Apex Distributing Co. Inc., Albert A. Finer and Joseph R. Snyder,

Petitioners,

—v.—

United States of America,

Respondent.

REPLY BRIEF FOR PETITIONERS

Petitioners herein respectfully submit this brief in reply to certain statements and arguments contained in the brief submitted by respondent in opposition to the petition for a writ of certiorari filed on their behalf. Petitioners know that the purpose of a reply brief is to answer only seriously erroneous statements of fact and arguments made in an opposing brief, and is not intended to restate all of a petitioner's arguments set forth in his initial pleading, and that other errors need not be challenged point by point.

With this preface, petitioners wish to state that they intend only to reply to one major erroneous statement of fact and argument made by the Government in its opposing brief, and it will be in terms of this point that they submit again that this case should be reviewed on certiorari by this Court. This point concerns petitioners' contention that the indictment in this case contained really only one alleged conspiracy which was broken up into two separate con-

spiracy counts solely for the purposes of prosecution, i.e., into counts one and eleven. (See petition herein, pp. 4, 5-8, 10, 40-41.)

It is to be remembered that the defendants charged in count 1 were Charles H. Gillilan, Albert A. Finer, Joseph R. Snyder, Apex Distributing Co. Inc., Wilshire Sales Associates, Inc. and Melrose Corporation (6a). The three defendant corporations were each the creatures of defendant Finer (3a-4a), and during the trial of this case there was no dispute as to this fact. The defendants named in count 11 were Gillilan, Finer, Snyder and Apex (21a). In other words, the Government eliminated from count 11 any alleged criminal participation of two of Finer's corporations, Wilshire and Melrose, although it incorporated in its pleading of count 11, paragraphs 1 and 2 of count 1 (21a, first paragraph of count 11). This incorporation by reference (see pp. 3a-6a) included the description and connection of all three of Finer's corporations, and let it be known that in essential part the two alleged conspiracies included all of the same individuals and none others. There are no other persons alleged to be co-defendants or co-conspirators not named as defendants in either of these two counts.

The time period covering these two alleged "separate" conspiracies are as follows:

> Count 1—From a date prior to January 1, 1954 to and including May 1, 1955 (6a).
>
> Count 11—From a date unknown to and including March 31, 1956 (21a).

As to count 11, the first alleged overt act is July 15, 1952 (24a); the last alleged overt act is September 22, 1955 (32a). Admiral Gillilan ostensibly and allegedly "joined" this count 11 conspiracy on October 31, 1953 (see Overt Act No. 19, p.

26a), which is "a date prior to the 1st day of January, 1954" (6a), the alleged starting date of the count 1 conspiracy. The Government does not pretend that Gillilan was allegedly in this conspiracy at any earlier time. As to the concluding or termination date of count 11, March 31, 1956, this date is fictitious since no activities subsequent to May 1955 were attempted to be or were proved by the prosecution. This was the time when Gillilan concededly had left Finer's employ (see paragraphs 1 and 3 of count 1, pp. 3a, 6a). It should be pointed out that Overt Act No. 32 of count 1 alleges the writing of a letter by defendant Snyder to the E. B. Evans Company, Philadelphia, Pennsylvania, on May 11, 1955 (11a), a date subsequent to the alleged approximate concluding date of this conspiracy, which is May 1, 1955, as set forth in paragraph 3 of this count (6a).

Then too, Overt Acts 1, 6, 8 and 13 of count 1 are identical with Overt Acts 19, 22, 24 and 27 of count 11 (see and compare, pp. 7a, 8a and 9a with pp. 26a and 27a), each allegedly committed in furtherance of these two "separate" conspiracies. The testimony to support the proof of these overt acts was received in evidence to prove both conspiracies without distinction.

As to the objects of the conspiracy, paragraph 4 of count 1 (6a-7a), alleged that in furtherance of that conspiracy Admiral Gillilan would be paid compensation for his services in soliciting and negotiating contracts for the sale of concentrated flavorings to the Navy Department. Paragraph 2b and c of count 11 alleged that this conspiracy was to defraud the United States of and concerning its right to have its Navy procurement personnel comply with procurement regulations "free from unlawful impairment by deceit, misrepresentations, false statements, and dishonesty" and "concerning its lawful right to have its contracts performed in accordance with their terms without fraudulent solicita-

tion and acceptance of orders thereunder" (21a-22a). Thus it is to be seen that the essential objects and characteristics of these alleged conspiracies was concerned with the procurement of contracts for the sale of concentrated flavorings to the Navy. The evidence at the trial was directed to the proof of this principal objective.

The Government's argument is that the conspiracies are separate. It states:

> "On its face, it (the count 1 conspiracy) is separate from and additional to the conspiracy to defraud in the actual making of sales, as charged in count eleven. The two conspiracies extended over different periods of time, and had different parties and different objects. The fact that a few of the overt acts committed in pursuance of the two conspiracies were the same is therefore immaterial. It was not necessary to the success of the conflict-of-interest conspiracy that the government be defrauded in any way, and conversely, the government could have been defrauded without any violation whatsoever of the conflict-of-interest laws by Admiral Gillilan. Petitioners could have been convicted on one and not the other count without any inconsistency in the jury's verdict" (p. 14, Brief for the United States in Opposition).

It has been shown above that the persons, time, objects and essential characteristics, as well as overt acts and proof, were the same in both alleged conspiracies. On the law, it is clear that we are here dealing really with only one alleged conspiracy and not two separate and distinct ones. *Braverman* v. *United States*, 317 U. S. 49; *Frohwerk* v. *United States*, 249 U. S. 204; *United States* v. *Rabinowich*, 238 U. S. 78; *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, cert. den. 304 U. S. 930; *United States* v. *Anderson*, 101 F. 2d 325, cert. den. 307 U. S. 625.

In 1919 this Court, in the *Frohwerk* case, faced with the argument that a single count in an indictment for conspiracy to commit two offenses is bad for duplicity, held that "the conspiracy is the crime, and that is one, however diverse its objects" (249 U. S. 204, 210). In the *Rabinowich* case in 1915, this Court held the conspiracy statute of limitations applicable to a prosecution for conspiracy to violate the Bankruptcy Act, rather than the shorter period prescribed for the substantive offense, on the ground that a conspiracy is not the commission of the underlying substantive crime and thus does not violate or arise under the statute whose violation is its object. *United States* v. *McElvain*, 272 U. S. 633, 638. Then in 1942, this Court in an unanimous decision, with an opinion by Mr. Chief Justice Stone, in the *Braverman* case, defined the "precise nature and extent of the conspiracy" concept in the following language:

> "For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.
>
> . . . Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts, which violate a single penal statute and from a single act which violates two statutes" (317 U. S. 49, 53-54).

In the *Dunkel* case, the Court of Appeals for the Second Circuit wrote:

> "Here the accused were associated in business and were engaged in the common enterprise of putting off upon the United States egg powder, different from what they represented it to be. Pursuant to this purpose they presented false claims on several different occasions but this did not mean that each false claim was a separate conspiracy. Indeed had the Section 83 indictment so charged it would have violated the rule of Braverman v. United States, 317 U. S. 49, 63 S. Ct. 99, 87 L. Ed. 23, which forbids multiplying conspiracies where the evidence shows only one agreement" (184 F. 2d 894, 897).

It is to be noted that here the alleged separate conspiracies each were charged as violations of Title 18, United States Code, §371, the "general" conspiracy statute. Neither count was laid under any special conspiracy statute, but both were alleged to be contemporaneous conspiracies among the same persons in violation of the same statute. It is clear that the fragmentation of one conspiracy into two counts for the purposes of prosecution is an erroneous concept which should not be countenanced by this Court.

In the case at bar, the conspiracy alleged in the indictment had one essential objective, and that was the sale of goods to the Navy by Finer's firm, Apex. Whether fraud in the making of sales was contemplated, whether improper use of Admiral Gillilan's services was contemplated, whether improper selling activities was contemplated, and whether substitution of inferior goods for the ordered merchandise was contemplated, under the allegations of both conspiracy counts, only one conspiracy was really alleged and proof was introduced only to attempt to prove one

conspiracy. "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, *supra*, 210; *Ford* v. *United States*, 273 U. S. 593.

Since the improper fragmentation of one alleged crime into several counts for the purposes of prosecution or punishment (see e.g., *Prince* v. *United States*, 352 U. S. 322, 325) is prohibited, it is submitted that the use of the device of fragmentation of one conspiracy into two counts of conspiracy is equally prohibited here. See Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Columbia Law Review, 957, 979-996 (1961).

It is therefore submitted that for the foregoing reasons the petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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September 21, 1961